

Calendar No. 926

106TH CONGRESS }
2d Session }

SENATE

{ REPORT
106-477

FORT SUMTER NATIONAL MONUMENT CONCESSIONS

OCTOBER, 3 (legislative day, SEPTEMBER 22), 2000.—Ordered to be printed

Mr. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 2331]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 2331) to direct the Secretary of the Interior to recalculate the franchise fee owed by Ford Sumter Tours, Inc., a concessioner providing service to Fort Sumter National Monument, South Carolina, having considered the same, reports favorably thereon with an amendment and an amendment to the title and recommends that the bill, as amended, do pass.

The amendments are as follows:

1. Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. ARBITRATION REQUIREMENT.

The Secretary of the Interior (in this Act referred to as the ‘Secretary’) shall, upon the request of Fort Sumter Tours, Inc. (in this Act referred to as the ‘Concessioner’), agree to binding arbitration to determine the franchise fee payable under the contract executed on June 13, 1986 by the Concessioner and the National Park Service, under which the Concessioner provides passenger boat service to Fort Sumter National Monument in Charleston Harbor, South Carolina (in this Act referred to as ‘the Contract’).

SEC. 2. APPOINTMENT OF THE ARBITRATOR.

(a) **MUTUAL AGREEMENT.**—Not later than 90 days after the date of enactment of this Act, The Secretary and the Concessioner shall jointly select a single arbitrator to conduct the arbitration under this Act.

(b) **FAILURE TO AGREE.**—If the Secretary and the Concessioner are unable to agree on the selection of a single arbitrator within 90 days after the date of enactment of this Act, within 30 days thereafter the Secretary and the Concessioner shall each select an arbitrator, the two arbitrators selected by the Secretary and the Concessioner shall jointly select a third arbitrator, and the three arbitrators shall jointly conduct the arbitration.

(c) **QUALIFICATIONS.**—Any arbitrator selected under either subsection (a) or subsection (b) shall be a neutral who meets the criteria of section 573 of title 5, United States Code.

(d) **PAYMENT OF EXPENSES.**—The Secretary and Concessioner shall share equally the expenses of the arbitration.

(e) **DEFINITION.**—As used in this Act, the term “arbitrator” either a single arbitrator selected under subsection (a) or a three-member panel of arbitrators selected under subsection (b).

SEC. 3. SCOPE OF THE ARBITRATION.

(a) **SOLE ISSUE TO BE DECIDED.**—The arbitrator shall determine—

(1) the appropriate amount of the franchise fee under the Contract for the period from June 13, 1991 through December 31, 2000 in accordance with the terms of the Contract; and

(2) any interest or penalties on the amount owed under paragraph (1).

(b) **DE NOVO DECISION.**—The arbitrator shall not be bound by any prior determination of the appropriate amount of the fee by the Secretary.

(c) **BASIS FOR DECISION.**—The arbitrator shall determine the appropriate amount of the fee based upon the law in effect on the effective date of the Contract and the terms of section 9 of the Contract.

SEC. 4. EFFECT OF DECISION.

(a) **RETROACTIVE EFFECT.**—The amount of the fee determined by the arbitrator under section 3(a) shall be retroactive to June 13, 1991.

(b) **NO FURTHER REVIEW.**—Notwithstanding subchapter IV of title 5, United States Code (commonly known as the Administrative Dispute Resolution Act), the decision of the arbitrator shall be final and conclusive upon the Secretary and the Concessioner and shall not be subject to judicial review.

SEC. 5. GENERAL AUTHORITY.

Except to the extent inconsistent with this Act, the arbitration under this Act shall be conducted in accordance with subchapter IV of title 5, United States Code.

SEC. 6. ENFORCEMENT.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under this Act, or by any unreasonable delay in the appointment of the arbitrator or the conduct of the arbitration, may petition the United States District Court for the District of South Carolina or the United States District Court for the District of Columbia for an order directing that the arbitration proceed in the manner provided by this Act.”

2. Amend the title so as to read: “To require the Secretary of the Interior to submit the dispute over the franchise fee owed by Fort Sumter Tours, Inc. to binding arbitration.”

PURPOSE OF THE MEASURE

The purpose of S. 2331 is to direct the Secretary of the Interior to submit a dispute between the National Park Service and Fort Sumter Tours, Inc. to binding arbitration to determine the appropriate concession franchise fee at Fort Sumter National Monument.

BACKGROUND AND NEED

Fort Sumter Tours, Inc. (FST) is a privately owned and operated business that provides boat transportation services at Fort Sumter National Monument under the terms of a concessions contract with the National Park Service. The contract, which was signed in 1986 and for a period of 15 years, provides FST the exclusive right to transport visitors by boat to Fort Sumter National Monument. The franchise fee for the first five years of the contract was set at 4.25 percent of FST’s gross annual receipts.

Consistent with the Concessions Policy Act of 1965 (the law in effect when the contract was entered into), the contract contained a provision allowing the National Park Service to reconsider the franchise fee every five years to determine whether the fee reflected the probable value of the contract. In 1991, the franchise fee analysis performed by the National Park Service determined that the fee should be increased to 12 percent. In 1992, the National

Park Service notified FST that it intended to increase the fee and that the concessioner had a contractual right to seek advisory arbitration.

In response, Fort Sumter Tours filed suit against the National Park Service in Federal District Court in 1993, on the basis that it believed the Park Service did not have the right to unilaterally increase the franchise fee. After failing to win its claim in the United States District Court for the District of South Carolina, FST appealed to the U.S. Court of Appeals for the Fourth Circuit, but again did not prevail. Fort Sumter Tours Inc. also filed suit against the National Park Service in the U.S. District Court for the District of Columbia. That court also ruled in favor of the Park Service, and the decision was affirmed by the U.S. Court of Appeals for the District of Columbia. In 1996, the Supreme Court rejected FST's attempt to seek a review of the decision of the lower courts decisions in favor of the National Park Service.

Notwithstanding its setbacks in court, Fort Sumter Tours, Inc. believes that the decision by the National Park Service to increase the franchise fee was based on flawed decisions and data. FST contends that the National Park Service is trying to charge on a punitive franchise fee based on: (1) unjustified changes to FST's audited financial statements; (2) unreliable industry statistical data; (3) a refusal to engage in substantive discussions about the fairness of the fee increase; and (4) a refusal to allow independent review of the merits of the fee increase.

LEGISLATIVE HISTORY

S. 2331 was introduced by Senator Hollings on March 30, 2000. The Subcommittee on National Parks, Historic Preservation and Recreation held a hearing on S. 2331 on July 13, 2000. At the business meeting on September 20, 2000, the Committee on Energy and Natural Resources ordered S. 2331, as amended, favorably reported.

COMMITTEE RECOMMENDATION

The Committee on Energy and Natural Resources, in open business session on September 20, 2000, by a majority voice vote of a quorum present, recommends that the Senate pass S. 2331, if amended as described herein.

COMMITTEE AMENDMENT

During the consideration of S. 2331, the Committee adopted an amendment in the nature of a substitute and an amendment to the title. The substitute amendment removed a provision in the bill as introduced that would have required the Secretary of the Interior to recalculate the franchise fee as the initial step in resolving the dispute. It also removed a provision that would have required the Federal Government to compensate Fort Sumter Tours, Inc. for attorneys fees and other costs associated with all proceedings involving the dispute if Fort Sumter tours, Inc. is the prevailing party in arbitration. Finally, the amendment removed a provision that would have prohibited the Secretary from advertising or accepting bids for the passenger boat service at Fort Sumter, and required

that Fort Sumter Tours, Inc. be offered annual extensions of the current concessions contract until the dispute is resolved.

SECTION-BY-SECTION ANALYSIS

Section 1 requires the Secretary of the Interior (Secretary), at the request of Fort Sumter Tours, Inc. (Concessioner), to agree to binding arbitration to resolve the franchise fee dispute pursuant to the contract under which the Concessioner provides passenger boat service at Fort Sumter National Monument.

Section 2 describes the procedures concerning the selection of an arbitrator and requires the Secretary and the Concessioner to share equally in the expenses of the arbitration.

Section 3 describes the scope of the arbitration and requires the arbitrator to determine the appropriate franchise fee based on the terms of the contract and the law that was in effect at the time the contract was signed.

Section 4 requires that the fee established by the arbitrator will be retroactive to June 13, 1991, and that the decision will be final and not subject to review.

Section 5 requires that the arbitration be conducted in accordance with the Administrative Dispute Resolution Act, except to the extent that it is inconsistent with this Act.

Section 6 allows either party, if aggrieved by the failure, neglect, or refusal of the other party to arbitrate, to petition the U.S. District Court for the District of South Carolina or for the District of Columbia for an order directing that the arbitration proceed.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the cost of this measure has been provided by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 2, 2000.

Hon. FRANK H. MURKOWSKI,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 2331, a bill to require the Secretary of the Interior to submit the dispute over the franchise fee owed by Fort Sumter Tours, Inc. to binding arbitration.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 2331—A bill to require the Secretary of the Interior to submit the dispute over the franchise fee owed by Fort Sumter Tours, Inc. to binding arbitration

S. 2331 would require the National Park Service (NPS) to have the franchise fee that it charges to Fort Sumter Tours, Inc. (FST)

determined by binding arbitration. (FST is a concessioner providing transportation to visitors at Fort Sumter National Monument.) The arbitrator would determine the appropriate fee applicable to the period between June 13, 1991, and December 31, 2000, including possible interest and penalties.

CBO cannot estimate the budgetary impact of S. 2331 because it would depend on the outcome of a legal proceeding that has not yet occurred. We expect that the arbitrator would choose a franchise fee of between 4.25 percent (which is what the company currently pays the NPS) and 12 percent (which is the adjusted rate established by the agency in 1991).

Under the higher rate of 12 percent, the federal government could receive about \$3 million in fees, interest, and penalties owed by FST since 1991. This amount could be collected—and spent—in the absence of legislation because the NPS has recently begun administrative action to collect it. If the lower rate would be chosen by an arbitration, the government would lose the \$3 million owed to it, reducing both offsetting receipts and direct spending by that amount in fiscal year 2001 or 2002.

What would happen to annual franchise fees after arbitration is also uncertain. CBO expects that by the time an arbitration decision would be reached, the FST concession contract will be expired. Annual offsetting receipts (and associated direct spending) from franchise fees after 2001 would depend on the outcome of competitive bidding for the concession.

S. 2331 could affect offsetting receipts (a credit against direct spending) and the spending of those receipts; therefore, pay-as-you-go procedures would apply. CBO estimates, however, that because the NPS would probably have been allowed to spend the amounts that it would have received in the absence of arbitration, the loss of any such amounts would have no net impact on the federal budget.

The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Deborah Reis. The estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 2331. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 2331, as ordered reported.

EXECUTIVE COMMUNICATIONS

On July 17, 2000, the Committee on Energy and Natural Resources requested legislative reports from the Department of the Interior and the Office of Management and Budget setting forth

Executive agency recommendations on S. 2331. These reports had not been received at the time the report on S. 2331 was filed. When the reports become available, the Chairman will request that they be printed in the Congressional Record for the advice of the Senate. The testimony provided by the National Park Service at the Subcommittee hearing follows:

STATEMENT OF DENIS P. GALVIN, NATIONAL PARK SERVICE,
DEPARTMENT OF THE INTERIOR

Thank you for the opportunity to present the position of the Department of the Interior on S. 2331, a bill to direct the Secretary of the Interior to recalculate the franchise fee owed by Fort Sumter Tours, Inc., a concessioner providing service to Fort Sumter National Monument in South Carolina.

The Department of the Interior strongly opposes S. 2331 and the Secretary would recommend that the President veto this bill if passed by Congress.

S. 2331 would require the Secretary of the Interior to recalculate the fees owed by Fort Sumter Tours pursuant to its concessions contract with the National Park Service. If the recalculated fee is unacceptable to Fort Sumter Tours, it would have the right to go through a binding arbitration process with the Secretary to determine the appropriate fee. The arbitrators would be prohibited from taking into account any previous judicial decisions on this issue, and Fort Sumter Tours would be entitled to collect attorneys fees for the legal expenses it has incurred litigating against the government.

S. 2331 is essentially a private relief bill that would undermine the authority of the federal judiciary by nullifying the decisions of five courts over the past seven years that have ruled against Fort Sumter Tours. In addition, S. 2331 would demean a fundamental principle that underlies these decisions—the importance of living up to one's contractual responsibilities.

Fort Sumter Tours presently owes over \$2,200,000 in fees, penalties and interest to the National Park Service under the contract that it entered into in 1986. This debt has been accumulating since 1991. When this contract was signed, it called for Fort Sumter Tours to pay a 4.25 percent franchise fee of gross annual receipts to the government in exchange for the exclusive right to transport visitors by boat to Fort Sumter National Monument. This fee was not set through an unfettered competitive process, as the law under which this contract was executed, the Concessions Policy Act of 1965 (repealed in 1998), contained provisions that discouraged outside businesses from applying for concessions contracts. The Concessions Policy Act balanced these anti-competitive provisions with a provision that required NPS to review the franchise fee under every contract every five years to determine whether it reflected the probable value of the contract. This fee reconsideration provision is reflected in section 9(e) of the standard concessions contract. Section 9(e) of the contract also provides for

an arbitration process to resolve disputes over the adjusted fee.

Fort Sumter Tours agreed to these terms when it entered into its contract in 1986. A franchise fee analysis performed in 1991 showed that the probable value of the privileges under the Fort Sumter contract warranted a fee of 12 percent, and that with a 12 percent fee Fort Sumter Tours would have a reasonable opportunity for profit. This analysis, like the type of analysis NPS performs under every concessions contract, compared the financial records and the business opportunity of Fort Sumter Tours, to those of similarly situated businesses, using industry statistics. Analyses have been performed on other contracts that involve services similar to those provided by Fort Sumter Tours. NPS financial analyses have resulted in fees of 12 percent and 13 percent for operators in Golden Gate National Recreation Area and the Statue of Liberty that transport park visitors by boat to park sites. These concessions operate profitably, and have not contested their fees.

In 1992, NPS notified Fort Sumter Tours that it was reconsidering its fee of 4.25 percent, and of its contractual right to seek advisory arbitration over the reconsidered fee. NPS also offered to discuss its financial analysis of the contract with Fort Sumter Tours with the intent that the parties could reach agreement over the fee. Fort Sumter Tours rejected these offers and opted instead to ignore the dispute resolution process it had agreed to in the contract and sued the National Park Service in Federal Court. Since Fort Sumter Tours first filed suit against the National Park Service in 1993, the four courts have examined its claims, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia, have found that the National Park Service acted appropriately in instituting a 12 percent fee under the Fort Sumter Tours contract. In addition, in 1996, the United States Supreme Court rejected Fort Sumter Tours attempt to seek Supreme Court review of the decision of the U.S. Court of Appeals for the Fourth Circuit. Despite these defeats, Fort Sumter Tours has continued to refuse to pay its contractually obligated franchise fee, and is seeking through S. 2331, to nullify these judicial decisions.

These decisions have been based on substantive, rather than procedural grounds. One of the primary issues before each court involved the principle that parties to a contract should be bound by the terms of their agreement. By signing its concessions contract, Fort Sumter Tours agreed to the dispute resolution process of Section 9(e), thereby committing itself to a process involving negotiation and, if necessary, advisory arbitration, to resolve any disputes relating to the fee. Fort Sumter Tours made a legal and business decision that it would not engage in this process. This

is a matter of substance, rather than procedure, as the dispute resolution language was a substantive part of the Fort Sumter contract. As the Court of Appeals for the District of Columbia recently stated: “Fort Sumter Tours chose to ignore the contractual requirements and went directly to the courts. Like the District Court, we find the contract unambiguous and plaintiff’s failure to abide by its terms fatal to its cause.”

Fort Sumter Tours is the only concessioner out of more than 600 that has refused to abide by section 9(e) of the concessions contract. Of the concessioners that have contested franchise fee reconsideration, all but three came to agreement with NPS without employing the arbitration procedures of section 9(e). The three concessioners that could not reach agreement with NPS by negotiation, successfully utilized the section 9(e) advisory arbitration process to resolve the dispute. While this process did result in an increased fee in each of these instances, each of these concessioners continues to operate profitably.

The extraordinary degree of harmony between NPS and its concessioners that is reflected by a track record that shows very few fee disputes is understandable, given the benefits that businesses receive in operating under a NPS concessions contract. As is the case under the Fort Sumter Tours concessions contract, the overwhelming majority of these businesses are given the exclusive opportunity to serve a market that is often captive and must use the services of a given concessioner. The beneficial nature of the opportunities presented by these contracts has been commented on extensively in at least 5 studies conducted by the GAO and the Inspector General’s office of the Department of the Interior over the past 10 years. These studies have concluded as a general rule that the NPS charges fees that are far lower than the market value of their corresponding contracts. It is therefore not surprising that there is no shortage of businesses that wish to apply for concessions contracts, and that the overwhelming majority of concessioners strive to abide by the terms of their contracts, including the advisory arbitration process in section 9(e).

The courts have looked closely at the substance of how NPS arrived at its fee. Both the district and appellate courts have found the Secretary’s decision to be proper, and the subsequent court opinions have supported the finding of the first court that reviewed this matter, the United States District Court for the District of South Carolina, which stated, “the resulting franchise fee is not excessive as to preclude a reasonable opportunity for profit.” These courts have noted that the provision that allows NPS to review fees during the course of a contract is not unfair, since NPS’s fee must, as a matter of law, allow a concessioner a reasonable opportunity for profit.

We understand that it has been reported to the committee that the National Park Service took into account non-concession revenue when calculating the profit that

Fort Sumter Tours makes under this contract. We have stated that on page 2 of the 1992 NPS franchise fee analysis, non-concession income was included in the initial determination of the minimum and maximum franchise fee. However, as we have also stated, this inclusion was a harmless oversight that had no impact on the franchise fee determination. Again, the courts fully reviewed the reconsideration of the franchise fee and determined that we acted reasonably in setting this fee. Fort Sumpter Tours has had countless opportunities to convince the courts that this information warranted the reversal of NPS's fee determination. They have been unsuccessful at every turn.

S. 2331 would also require the taxpayer to reimburse Fort Sumter Tours for the expenses it has incurred in litigation against the government. This is extremely unfair to the taxpayer, as current law grants prevailing parties against the United States the opportunity to be reimbursed for reasonable attorney fees. However, in this case, the legislation would grant attorneys fees to an individual who did not prevail in any of the five courts that reviewed this concessioner's claims.

In addition, there is no guarantee that S. 2331 would satisfy Fort Sumter Tours. If the Secretary prevailed in the binding arbitration under S. 2331—that is, if the panel established a franchise fee of 12%—Fort Sumter Tours would still have the right to appeal this decision to a federal judge.

Moreover, subsection 1(d) of S. 2331 would prevent the National Park Service from awarding a new contract for the tour boat services at Fort Sumter Park National Monument until this matter was completely resolved and no longer subject to appeal. The present contract for these services expires on December 31, 2000. We expect to issue a prospectus for this contract prior to the end of this year. The language in subsection 1(d) would put this process on hold for an indefinite time period, as the appeal process could run for a considerable length of time—as long as 8 years if the present appeals process is an accurate indicator. This would prevent the National Park Service from advertising the contract to the business community, and seeking a fee that represents the true market value of the contract. In fact, as we fully expect that the market will determine a fee for this contract that is substantially equal to or greater than the fee that is in dispute under the present contract, any effort to freeze the fee during a pending arbitration and its subsequent appeal process could shortchange the taxpayer out of a just return under the contract. It would also prevent other businesses, several of which have already expressed interest in the new contract, from applying for this lucrative opportunity. As a government contract, this opportunity should be available through a fair competitive process to the tax-paying business community at large, rather than frozen for the benefit of one business until the appeals process runs its course.

There is no question that the dispute between Fort Sumter Tours and the United States Government involves an amount of money—approximately \$2,200,000—that is considered significant by the concessioner and the NPS. But beyond the financial obligation, enactment of S. 2331 would send a message that no legal dispute with the United States Government is over, even if all judicial remedies have been exhausted. S. 2331 would also send a message that demeans the importance of requiring parties to live up to their obligations under commercial contracts, a principle that underlies each of the court decisions that has gone against Fort Sumter Tours. It is with these premises in mind that we would recommend that the President veto this bill if it is passed by Congress.

I would also like to note, in closing, that the NPS has attempted to settle this dispute with Fort Sumter Tours on several occasions, and, through the Department of Justice, remains open to any reasonable settlement offer from Fort Sumter Tours.

This concludes my testimony. I would be happy to answer any of your questions.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill S. 2331, as ordered reported.

